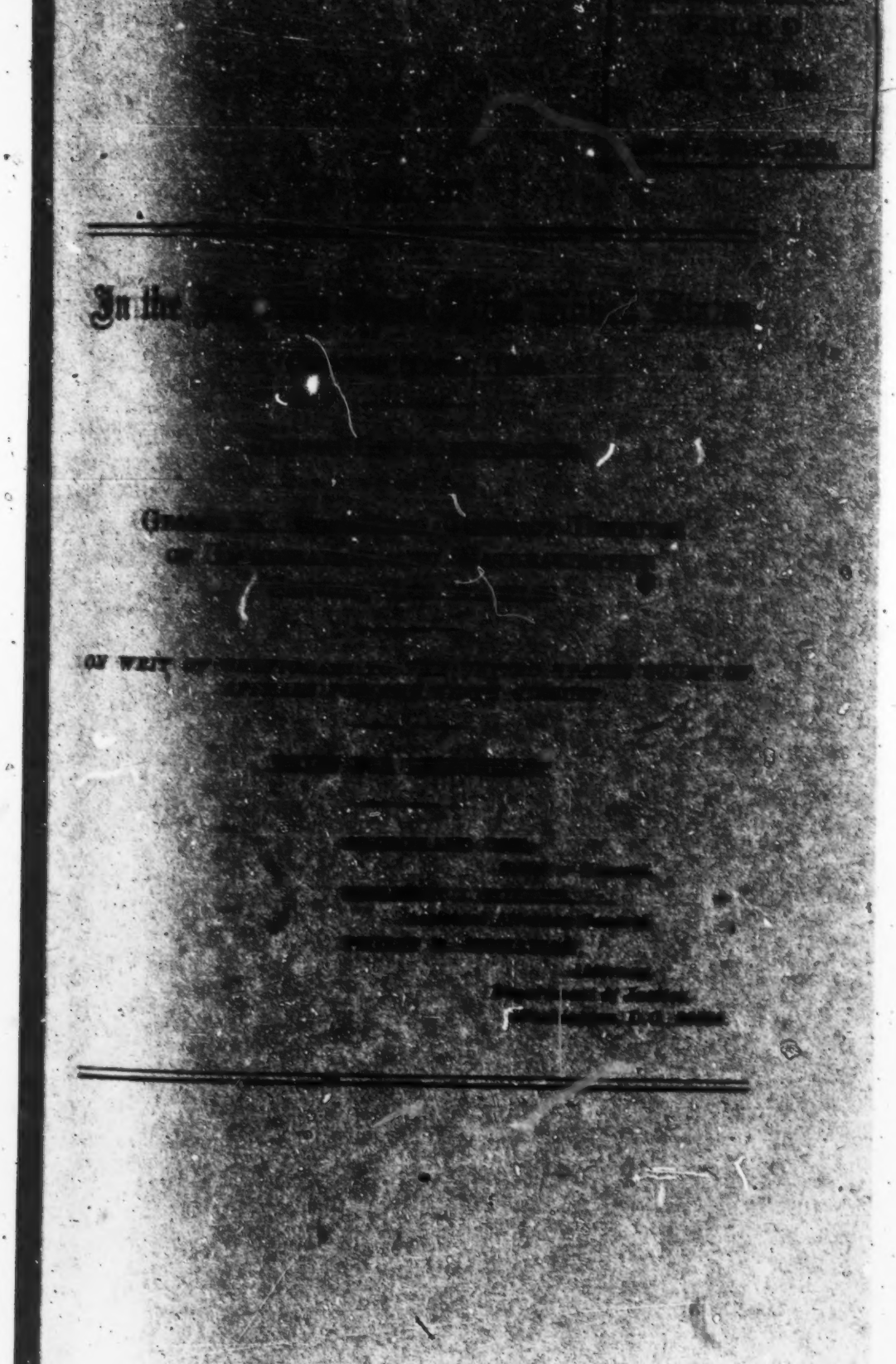

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 23

FILIPPO GIOVA, PETITIONER

v.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 52–53) is reported at 308 F. 2d 347.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1962 (R. 54), and a petition for rehearing was denied on October 23, 19[illegible] (R. 55). The petition for a writ of certiorari was filed on January 5, 1963, and granted on January 6, 1964 (R. 56; 375 U.S. 964). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (Supp. V) 1105a(a), vesting in the courts of appeals exclusive jurisdiction to review "all final orders of deportation," applies to an order of the Board of Immigration Appeals refusing to reopen a deportation proceeding following the entry of an order of deportation.

STATUTE AND REGULATIONS INVOLVED

Section 106 of the Immigration and Nationality Act, as added by Section 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651 (8 U.S.C. (Supp. V) 1105a), and the relevant provisions of Parts 3 and 242 of Title 8 of the Code of Federal Regulations as they read at the time of the enactment of Section 106 appear in the Appendix, *infra*, pp. 22–31.

STATEMENT

On September 16, 1957, an order of deportation, entered against petitioner by a special inquiry officer on April 2, 1957, became administratively final upon the dismissal of an appeal therefrom by the Board of Immigration Appeals (R. 26–27, 28–30). On November 3, 1961, following further administrative proceedings, the Board denied a supplemental motion by petitioner, filed September 25, 1961, to reopen the deportation proceedings (R. 16–19, 20–23). On November 30, 1961, petitioner filed in the United States Court of Appeals for the Ninth Circuit, pursuant to Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (Supp. V) 1105a(a) (Appendix, *infra*,

pp. 22–25), a petition for review of the Board's November 3 order (R. 1–6).[1] On June 15, 1962, the court of appeals dismissed the petition for lack of jurisdiction—on the ground that the order sought to be reviewed was not a "final order of deportation" within the meaning of Section 106(a) (R. 52–53).

The relevant facts are as follows:

1. Petitioner, a 51-year-old alien, a native and citizen of Italy, first entered the United States in 1920 at the age of 6 or 7 (R. 20, 24, 28, 50). He is the husband of a native-born citizen of the United States, whom he married in 1933, and the father of her three citizen children, all now adults (R. 2, 18, 25). On February 16, 1940,[2] in the first of a series of expulsion directives which have been entered against him, petitioner was ordered deported on the ground (see 39 Stat. 889, now § 241(a)(4) of the Immigration and

[1] The petition for review named as respondent George K. Rosenberg, the District Director of the Immigration and Naturalization Service at Los Angeles. Technically, the action should have been against the Immigration and Naturalization Service (see Section 106(a)(3), 8 U.S.C. (Supp. V) 1105a(a)(3) (Appendix, *infra*, p. 23)). So far as appears, the error was not called to the attention of the court of appeals, whose opinion and judgment, consequently, were styled in the same manner as the petition (R. 52–53, 54). The caption has been continued in the proceedings in this Court. While the point is of no substantive importance, we call it to the Court's attention at this time with the suggestion that an order be entered, prior to or contemporaneously with the Court's decision and opinion, changing the style of the case to conform with the directive of Section 106(a)(3), *supra*. Cf. *Fong* v. *Immigration and Naturalization Service*, 308 F. 2d 191, 192 (n. 2), 196 (C.A. 9); *Talavera* v. *Pederson*, 334 F. 2d 52, 56 (C.A. 6).

[2] The date "1960" appearing in the printed copy of the order (R. 24) is a misprint.

Nationality Act, 8 U.S.C. 1251(a)(4)) that he had been twice sentenced to imprisonment for one year or more—in California, in 1935 and 1938, respectively—for crimes involving moral turpitude, to wit, robbery and forgery (R. 24–25). On June 8, 1946, following his release from imprisonment under the foregoing sentences in 1941 and further proceedings which it is unnecessary to detail, he was duly deported to Italy (R. 20–21, 25, 28, 50; A.R.[3] 77, 122–132).

On November 7, 1948, petitioner attempted to reenter the United States at the port of New York as a stowaway; he was detected, excluded, and, on January 21, 1949, again deported (R. 21, 35, 50; A.R. 114–116). In September or October 1952, he reentered this country surreptitiously from Mexico at San Ysidro, California (R. 21, 35, 50), and on January 30, 1953, following a hearing, he was again ordered deported (R. 35; A.R. 101–102). In February 1953, while he was at liberty under bond pending execution of the last-mentioned order, he jumped bail and fled to Canada with his family (R. 35; A.R. 95–100). On or about December 24, 1954, he reentered the United States, again surreptitiously, at Blaine, Washington (R. 21; A.R. 90, 95–96). He has resided here continuously since 1954 (R. 21).

On April 2, 1957, following a hearing before a special inquiry officer, petitioner was again ordered deported (R. 26–27).[4] This order, as previously noted, became final on September 16, 1957, upon the dismissal

[3] "A.R." refers to the certified administrative record, on file in the Clerk's office.

[4] The order directed petitioner's deportation "under the previous order of deportation dated February 16, 1940, in accord-

of petitioner's appeal from it by the Board of Immigration Appeals (R. 28–30; see 8 C.F.R. §§ 3.1(d)(2) and 242.20 (Appendix, *infra*, pp. 27, 31)). Petitioner did not seek judicial review of the order, and it remains outstanding, unaffected by any of the later proceedings (summarized below).

2. Some time subsequent to the Board's order of dismissal, *supra*—the exact date does not appear from the record—petitioner initiated before the Immigration and Naturalization Service proceedings known as "preexamination" proceedings,[5] the purpose of which was to avail himself of the benefits of a 1957 statute affecting the admissibility to the United States for permanent residence of persons in his situation. Prior to September 11, 1957, an alien who, like petitioner, had been convicted of a crime involving moral turpitude was ineligible for a visa and required to be excluded from the United States. § 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9). Effective as of that date, Congress vested in the Attorney General—by Section 5 of the Act of September 11, 1957, 71 Stat. 640[6]—discretionary authority

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ance with Section 242(f) of the Immigration and Nationality Act" (R. 27). Section 242(f) (8 U.S.C. 1252(f)) provides that where an alien unlawfully reenters the United States following his deportation on any of certain enumerated grounds—including the ground here relevant—the original order of deportation is to be deemed reinstated, and the alien deported thereunder.

[5] See 8 C.F.R. (1958 rev.) Part 235a, as amended, 23 F.R. 6543, 23 F.R. 8395. Such proceedings have since been abolished (24 F.R. 6477), having been largely superseded by statutory adjustment-of-status procedures. See Gordon and Rosenfield, *Immigration Law and Procedure*, § 7.3a.

[6] Now § 212(g) of the Immigration and Nationality Act, 75 Stat. 655, 8 U.S.C. (Supp. V) 1182(h).

to admit for permanent residence any alien who, though within the excludable class referred to (among other categories designated), was the spouse, child, or parent of a United States citizen or alien lawfully admitted for permanent residence, if it was established to the Attorney General's satisfaction that (among other things) his exclusion would result in extreme hardship to the citizen or lawfully resident alien relative. On May 4, 1959, petitioner was advised that his application for the privilege of preexamination had been granted (R. 31–32); on June 16, 1959, he was given leave to apply for admission to the United States in advance of deportation (R. 34, 39); and on June 30, 1959, his application for waiver of his excludability from the United States resulting from his California convictions for robbery and forgery (see *supra*, pp. 3–4) was granted by order of a special inquiry officer following a hearing (R. 33, 35–39). This order, which was issued by the same special inquiry officer who had entered the outstanding order of deportation, directed that petitioner, notwithstanding his excludability, be found admissible to the United States "when in possession of appropriate documents" (R. 38–39). Among the documents required for this purpose was a visa, issued by a United States consular officer, admitting him to the United States (see pp. 6–7 *infra*).

On September 9, 1959, petitioner was advised by the United States Consul at Vancouver, British Columbia—to whom he had applied for a visa in accordance with the plan of the preexamination proceedings[7]—

[7] The proceedings contemplated that petitioner, if found eligible for and deserving of the relief afforded by the 1957

that he was ineligible for a visa, and inadmissible to the United States, under Section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(23) (R. 4, 42). The cited provision of the Act makes inadmissible any alien who has been convicted of violating any law or regulation relating to the illicit possession of or traffic in narcotic drugs; conviction of such an offense is not one of the grounds of exclusion which the Attorney General has been empowered to waive. The conviction referred to by the Consul—of which the special inquiry officer had been unaware (see R. 37; A.R. 69–70)—had been entered on November 21, 1952, by the Court of Appeal of Genoa, Italy (R. 7).[8]

3. On May 25, 1961—two days after he had been instructed to present himself, on May 29, ready for deportation, at the Los Angeles Office of the Immigration and Naturalization Service—petitioner filed with the Los Angeles District Director a document denominated a "PETITION (1) TO REOPEN PROCEEDINGS; (2) FOR WAIVER OF GROUNDS OF EXCLUDABILITY UNDER SECTION 5 OF THE

Act, would apply to a United States consul in Canada for a visa authorizing him to enter the United States for permanent residence: if the application was favorably acted upon, he would enter Canada, secure his visa, and immediately reenter the United States as a permanent resident. See Gordon and Rosenfield, *Immigration Law and Procedure*, § 7.3c.

[8] Petitioner was sentenced for the offense, described as "[c]landestine commerce," to eight months' imprisonment and to pay a fine of 5667 lire (R. 7). He was apparently in the United States at the time of the entry of the judgment (see *supra*, p. 4). The events on which the conviction was based evidently occurred in Genoa in 1950 (R. 37; A.R. 70).

ACT OF SEPTEMBER 11, 1957, AS AMENDED; (3) FOR LEAVE TO FILE APPLICATION FOR SUSPENSION OF DEPORTATION; and (4) FOR STAY OF DEPORTATION" (R. 40–46). He stated in the petition that he was not aware of the exact nature of the charge and proceedings on which the United States Consul at Vancouver had based his refusal to issue him a visa, but that he believed that the facts and circumstances surrounding those proceedings did not constitute a valid basis for his exclusion (R. 43). He requested that he be granted a hearing before a special inquiry officer to determine whether the Consul's action was valid; that, if it was valid, the relevant ground of exclusion be waived by the Attorney General pursuant to Section 5 of the 1957 Act, *supra;* that, alternatively, he be granted leave to apply for suspension of deportation under Section 244 of the Immigration and Nationality Act, 8 U.S.C. 1254; and that his deportation be stayed in the interim (R. 43–46).

On May 26, 1961, the Los Angeles District Director transmitted the petition—which he described as a "Motion to Reopen"—to the Board of Immigration Appeals with a recommendation that it be denied (R. 47–48). With respect to to petitioner's request that he be granted a hearing to determine whether the Consul's action in refusing him a visa was valid, the district director stated, in his forwarding memorandum, that neither the Board's authority nor that of the Service extended to testing the validity of a denial of a visa by State Department authorities (R. 48). With respect to petitioner's request that he be granted

a waiver, pursuant to Section 5 of the 1957 Act, of his excludability under Section 212(a)(23) of the Immigration and Nationality Act (the ground of inadmissibility on which the Consul had based his action), the district director noted that that was not a ground of excludability which was subject to waiver under Section 5 (R. 47–48). And with regard to the request that the proceedings be reopened to enable petitioner to apply for suspension of deportation, the district director stated that it appeared from the motion itself, as well as from the record of the proceedings generally, that petitioner was ineligible. He explained that the charge of deportability was such that petitioner could qualify for suspension of deportation, if at all, only under the provisions of paragraph (4) or (5) of Section 244(a) of the Act; that a requirement of both paragraphs was at least ten years' continued physical presence in the United States; that it was uncontested that petitioner's last entry into the United States was in December 1954; and that he accordingly could not qualify under that test (R. 47).

On June 12, 1961, the Board denied the motion (R. 49–51). It agreed with the district director that the granting or denial of visas to aliens is a function exclusively within the jurisdiction of consular officers of the State Department (R. 50–51) and that no useful purpose would be served in reopening the proceedings to entertain an application for suspension of deportation because petitioner was ineligible for such relief under "any of the several paragraphs of Section 244(a) of the Immigration and Nationality Act" (R.

50).[9] (The Board made no specific reference to the prayer of the petition that petitioner's excludability under Section 212(a)(23) of the Act be waived.)

On September 25, 1961,[10] petitioner filed with the Los Angeles District Director a "supplemental" petition (R. 16–19)—otherwise styled in the same form as the May 25 petition (see *supra*, pp. 7–8) and incorporating the latter by reference (R. 18–19)—in which he represented to the immigration authorities that his 1952 Italian conviction, on the basis of which the United States Consul at Vancouver had refused him a visa, had been "expunged" by the court of conviction as of July 14, 1961, and all penal effects thereof extinguished, under provisions of Italian law (R. 17-18).[11] A certificate, bearing that date, by the Gen-

[9] At the time the Board wrote, Section 244(a) provided, in five numbered paragraphs, for five categories of aliens declared to be eligible for suspension of deportation. Each category had a different set of eligibility requirements, including a specified number of years, ranging from five to ten, of required continuous physical presence in the United States. The section has since been simplified and the categories reduced to two, for which the required periods of continuous physical presence are seven and ten years, respectively. Act of October 24, 1962, § 4, 76 Stat. 1247 (8 U.S.C. (Supp. V) 1254(a)).

[10] The date "1951" appearing on the face of the supplemental petition (R. 19) was a typographical error in the original document.

[11] Petitioner explained that, following his receipt of the Consul's communication of September 9, 1959, *supra*, denying him a visa, he had initiated an investigation to determine the nature of the proceedings upon which the Consul had based his action; that he was advised in the course of the investigation that he could have the record of these proceedings expunged and their penal consequences canceled; that he accordingly caused a petition to be filed with court of conviction requesting such relief; and that on the date mentioned, upon

court in which the conviction had been rendered, pronouncing the "rehabilitation" of petitioner, "for all legal purposes", was appended as an exhibit (R. 7–8, 18).[12] On the basis of this intervening action by the Italian court, petitioner renewed his request that he be granted a waiver of his excludability arising from that conviction (R. 19). He also renewed his request for permission to apply for suspension of deportation (*ibid.*).

On September 27, 1961, the district director forwarded the supplemental petition to the Board (A.R. 6–7), which denied it on November 3, 1961 (R. 20–23). Observing that the record relating to petitioner's "rehabilitation" by the Genoa court was the only matter in the new motion not previously considered, the Board held that there was no need to determine whether the order of rehabilitation had effectively expunged the conviction in question because the

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the recommendation of the District Attorney of Genoa, his petition had been granted (R. 17–18).

[12] The order of rehabilitation was apparently issued pursuant to Article 179 of the Italian Penal Code, providing, in relevant part, that "Rehabilitation i[s] granted when 5 years have elapsed from the day on which the principal punishment was executed or was in any other way extinguished, and the convicted person has given effective and constant evidence of good conduct" (R. 7, 13). (It should be noted, however, that petitioner has evidently never served any part of the prison sentence imposed in connection with his conviction (see fn. 8, *supra*, p. 7); whether the fine which was levied (see *ibid.*) has ever been paid does not appear.) The legal effect of the court's action under Italian law is unclear. Article 178 of the Penal Code states that "Rehabilitation extinguishes the accessory punishments and every other penal effect of the conviction, unless the law provides otherwise" (R. 13).

courts of the United States limit pardons and other acts in the nature of a pardon or amnesty exclusively to convictions in this country (R. 22). The Board, in addition, again noted that petitioner was ineligible for suspension of deportation, and that it would accordingly be pointless to reopen the proceedings to permit him to apply for such relief (R. 23).

The petition for review (R. 1–6), filed November 30, 1961, in the Court of Appeals for the Ninth Circuit, sought review of the November 3 order. That court dismissed the petition for want of jurisdiction upon the ground that the November 3 order was not "a final order of deportation" (R. 52–53).

SUMMARY OF ARGUMENT

I

An order refusing to reopen a deportation proceeding is so immediately associated with the final order of deportation that it should be treated as ancillary for purposes of review. The objective of Section 106(a) of the Immigration and Nationality Act, as its legislative history confirms, was to provide a single, unitary review procedure, in an appropriate court of appeals, for every litigable issue that might arise in a deportation proceeding. The denial of a motion to reopen such a proceeding presents such an issue.

II

The literal construction adopted by the court of appeals frustrates the basic purpose of Section 106(a)—the shortening of the process of judicial review of deportation orders by eliminating the previous initial step in such review, a suit in a district court—and

leads to bifurcated review of what is essentially a single proceeding. It would be no less undesirable for a refusal to reopen a deportation proceeding to be reviewable in a district court while the deportation order was being reviewed in a court of appeals than for a refusal to grant suspension of deportation to be reviewable in the one court while the adjudication of deportability was being reviewed in the other. It was precisely the fact that the Second Circuit's construction of Section 106(a) lent itself to this latter possibility that caused this Court to reject it in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217.

It is true that the decision below has not resulted in bifurcated review in this case—for the fortuitous reason that petitioner is not seeking review of the deportation order proper. But neither had bifurcation resulted in the *Foti* case under the Second Circuit's decision—for the analogous reason that Foti had not sought review of the determination of deportability, but only of the refusal to grant him discretionary relief. It was the fact that the Second Circuit's approach would often lead to fragmentation of what is essentially a unitary review proceeding which constituted the defect of the lower court's interpretation. The decision below is subject to precisely the same objection.

ARGUMENT

In our brief in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, in which the Court held that a refusal by the Attorney General to grant suspension of deportation was one of those "final orders of deportation" made directly reviewable in the courts of appeals by Section 106(a) of the Immigration and

Nationality Act, we expressed the view—in reply to an argument advanced by the lower court in support of its contrary holding in that case—that an administrative refusal to reopen a deportation proceeding, after an expulsion order had been entered and become final, was likewise within the scope of the section (Brief for Respondent, No. 28, October Term, 1963, pp. 51–54). Conceding that the question was a close one, we suggested that both the spirit of the enactment and sound principles of statutory construction justified the inclusion of such orders within the statutory language—whether the purpose of the request to reopen was to present new evidence on the issue of deportability, to apply for some form of discretionary relief, or to accomplish some other pertinent objective (*id.*, p. 52). The Court, in its opinion, adverted to the issue thus tangentially raised, but found it unnecessary to resolve it at that time (375 U.S. at 231).[13]

In the instant case the question previously considered is squarely presented. For the reasons which follow we adhere to our earlier suggestion and join with petitioner in urging reversal of the judgment dismissing the petition for review for lack of jurisdiction.[14]

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[13] The Court commented merely that "[t]he question is admittedly a somewhat different one [from the *Foti* issue], since such an administrative determination is not made during the same proceeding where deportability is determined and discretionary relief is denied" (*ibid.*).

[14] In the court below, the government did no more than raise the question of the court's jurisdiction. It neither argued the point nor expressed a view as to its proper resolution (Respondent's Opening Brief, C.A. 9, No. 17655, p. 2; see Pet. Br.

I

AN ORDER REFUSING TO REOPEN A DEPORTATION PROCEEDING IS SO IMMEDIATELY ASSOCIATED WITH THE FINAL ORDER OF DEPORTATION THAT IT SHOULD BE TREATED AS ANCILLARY FOR PURPOSES OF REVIEW

Section 106(a) makes subject to initial review by the courts of appeals "all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act * * *." *Literally*, an order denying a motion to reopen a deportation proceeding is not a "final order of deportation." The order of deportation, by hypothesis, was previously entered and permitted to become final—either through failure to appeal to the Board of Immigration Appeals or, if an appeal was taken, by the Board's refusal to disturb the order (8 C.F.R. §§ 3.1(d)(2), 242.20 (Appendix, *infra*, pp. 27, 31)). If, therefore, Section 106(a) were to be construed with absolutely literal strictness, a refusal to reopen the proceedings would fall outside it.

Considering the evident scheme and purpose of the statutory change, we believe that such a wooden reading of Section 106(a) is inappropriate. Unmistakably, the aim of that section—as its legislative history confirms (see *infra*, pp. 18–19, and pp. 24–27 of our *Foti* brief)—was to provide a single, unitary review procedure, in an appropriate court of appeals, for every litigable issue that might arise in a deportation

4-5). In this Court we joined petitioner in urging that certiorari be granted (No. 898 Misc., Oct. Term, 1962).

proceeding. The denial of a motion to reopen such a proceeding surely presents such an issue.

To be sure, we acknowledged in our *Foti* brief that certain types of orders—similar, in one respect, to denials of motions to reopen—were probably outside the coverage of Section 106(a). Administrative orders designating the country to which the respondent alien was to be expelled and orders denying temporary "withholding" of deportation under Section 243(h) of the Act (on account of anticipated physical persecution) were not within the scope of Section 106(a), we thought, prior to the 1961–1962 change in the regulations (discussed in the brief) under which such orders are now made in the deportation proceedings proper.[15] We took that position because, although the issues involved were debatable,[16]

[15] See our *Foti* brief at pp. 47–48 and fn. 30, p. 50; and see the *Foti* opinion, 375 U.S. at 230, n. 16. (Such orders, we thought, as a consequence of the change in the regulations referred to, are now subject to Section 106(a) review (Brief, pp. 49–51)—a conclusion in which the Court indicated that it concurred (375 U.S. at 229–230, incl. n. 16).)

[16] As noted in our *Foti* brief (fn. 28, pp. 48–49), the Court of Appeals for the Seventh Circuit has held that orders denying Section 243(h) relief were within the coverage of Section 106(a) under the pre-1962 regulations. *Blagaic* v. *Flagg*, 304 F. 2d 623. See, also, *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453, 454–455, certiorari denied, 371 U.S. 921, where the same court, in an even freer interpretation of Section 106(a), held the measure applicable to an administrative denial, made subsequent to the issuance of a final deportation order, and by an officer who had no part in the deportation proceeding, of a first preference immigrant visa—for the reason, the court concluded, that, had the visa been granted, it would practically have mooted the deportation order. And see *Skiftos* v. *Immigration and Naturalization Service*, 332 F. 2d 203, in

it seemed an undue strain upon the statutory language to extend it to a determination made (as both those types of order had been made prior to the change in regulations) "*subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), by an official *other than* the special inquiry officer who presided over the deportation proceedings and issued the order of deportation" (Brief for Respondent, p. 48; emphasis in the original).

As we noted in the *Foti* brief, a refusal to reopen, like the designation of the country of deportation and a refusal to grant Section 243(h) relief under the pre-1962 practice, occurs subsequent to the final order of deportation. But a refusal to reopen is wholly unlike those orders in the other respects mentioned. The denial of a motion to reopen is made by the same officer who entered the final order of deportation—or, if the order was appealed, as here, to the Board of Immigration Appeals, then by that body, which, by its decision dismissing the appeal, in effect endorsed the deportation order and assumed responsibility for it—and is directly linked with the original proceedings out of which the deportation order arose. For these reasons it would be artificially literal, in the government's view, to attempt to dis-

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which the Seventh Circuit recently reaffirmed its holding in the *Roumeliotis* case.

The decisions of other courts, holding Section 106(a) inapplicable to the denial of Section 243(h) relief and to orders specifying the country of deportation under the pre-1962 regulations, are cited in footnotes 28 and 30 of our *Foti* brief, at pp. 48-49 and 50.

tinguish, for purposes of Section 106(a), between the final order proper and the denial of a motion to reopen the proceedings. In other words, an order declining to reopen the proceedings is so intimately and immediately associated with the principal order (the final order of deportation) that it would be pointless to require that the subsidiary directive be treated otherwise than as an adjunct of the principal order—comparable to the denial of a motion for rehearing or reconsideration.[17] So considered, it should be reviewable, the government believes, in the same forum in which the principal order would be reviewable if review of the latter were sought.

II

THE LITERAL CONSTRUCTION ADOPTED BY THE COURT OF APPEALS FRUSTRATES THE BASIC PURPOSE OF SECTION 106(a), AS DISCLOSED BY ITS LEGISLATIVE HISTORY, AND LEADS TO BIFURCATED REVIEW OF WHAT IS ESSENTIALLY A SINGLE PROCEEDING

In holding that denials of discretionary suspension of deportation are within the purview of Section 106 (a), this Court, in the *Foti* case, pointed out that the fundamental purpose behind that enactment was "to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby

[17] The regulations, significantly, treat orders of the Board granting motions to reopen and orders granting motions for reconsideration as practically indistinguishable. See 8 C.F.R. §§ 3.2, 3.8 (Appendix, *infra*, pp. 27–30). Cf. 8 C.F.R. (1958 rev., Cum. Pocket Supp. as of January 1, 1964) § 242.22 (reopening or reconsideration by special inquiry officer).

persons subject to deportation were forestalling departure by dilatory tactics in the courts" (375 U.S. at 224). The key feature of the congressional plan, the Court noted, "was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals, subject only to the certiorari jurisdiction of this Court" (*id.* at 225). These congressional objectives would be frustrated, the Court held, by a construction requiring that a denial of discretionary relief be sought in a district court while the determination of deportability was being reviewed in a court of appeals. "Review of the denial of discretionary relief is ancillary to the deportability issue," said the Court, "and both determinations should therefore be made by the same court at the same time" (*id.* at 227). "Bifurcation of judicial review of deportation proceedings is not only inconvenient; it is clearly undesirable and not the necessary result from a fair interpretation of the pertinent statutory language" (*id.* at 232).

These considerations are equally applicable to an order denying a motion to reopen. A refusal to reopen a deportation proceeding is as truly ancillary to the deportation order in which the proceedings culminated (see *supra,* pp. 15–18) as a denial of discretionary relief is to the determination of deportability. And it would surely be no less undesirable for the refusal to reopen such a proceeding to be reviewable in a district court while the deportation order was being reviewed in a court of appeals than for a refusal to grant suspension of deportation to be reviewable in the one court while the adjudication of deportability

was being reviewed in the other. Bifurcation of the review procedure would, in short, be just as objectionable in the one situation as in the other.[18]

It is true, to be sure, that the decision below has not resulted in bifurcated review in this case—for the fortuitous reason that petitioner is not seeking review of the deportation order proper.[19] But neither had bifurcation resulted in the *Foti* case under the Second Circuit's decision—for the analogous reason that Foti had not sought review of the determination of deportability, but only of the refusal to grant him discretionary relief. It was the fact that the Second Circuit's approach would often lead to fragmentation of what is essentially a unitary review proceeding which constituted the defect of the lower court's interpreta-

[18] Since a refusal to reopen a deportation proceeding is concededly reviewable in *some* court—the issue being merely which court, the district court or the court of appeals, is the proper forum—decisions like *Securities and Exchange Commission* v. *Louisiana Public Service Commission*, 353 U.S. 368, and *Filice* v. *Celebrezze*, 319 F. 2d 443 (C.A. 9), holding the motions to reopen involved in those cases not subject to review, are inapposite.

[19] Petitioner could have sought review of the deportation order at the same time that he petitioned for review of the order refusing to reopen the proceedings. Although the deportation order became final on September 16, 1957—more than four years prior to the filing, on November 30, 1961, of the petition for review—the six months' limitations period prescribed by Section 106(a) runs "from the date of the final deportation order or from the effective date of this section, whichever is the later" (§ 106(a)(1) (Appendix, *infra*, p. 23)). The effective date of the section was October 26, 1961. (Appendix, *infra*, p. 22, fn. 1).

tion. We have pointed out that the decision below has precisely the same disability.

CONCLUSION

For the reasons stated the government respectfully submits, with petitioner, that the judgment of the court of appeals should be reversed and the cause remanded to that court with directions to entertain the petition for review.

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OCTOBER 1964.

[20] It should be noted that the construction of Section 106(a) suggested by the government does *not* permit circumvention of the six-month limitations period prescribed for the filing of petitions for review (§ 106(a)(1) (Appendix, *infra*, p. 23)). If, after entry of a final order of deportation, an alien fails to seek review of the order within six months, he cannot thereafter revive his right to review of that order merely by filing a motion to reopen the proceedings. Review under Section 106(a) of the denial of a motion to reopen is limited, in other words, under the government's interpretation, to the propriety and legality of the order of denial itself. An alien who has failed to seek timely review, under Section 106(a), of a final order of deportation proper may seek review of *that* order only in habeas corpus proceedings, after he has been taken into custody for deportation. See § 106(a)(9) (Appendix, *infra*, p. 25), and cf. § 106(c) (Appendix, *infra*, p. 26).

APPENDIX

1. Section 106 of the Immigration and Nationality Act, as added by Section 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651 [1] (8 U.S.C. (Supp. V) 1105a), provides:

JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION

SEC. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.),[2] shall apply to, and shall be the sole

[1] Section 5(b) of Public Law 87-301 (75 Stat. 653) provided that the newly enacted section was to take effect on the thirtieth day after its approval—*i.e.*, on October 26, 1961—and that, irrespective of the provisions of any other law, including Section 405 of the Immigration and Nationality Act (the saving clause of that Act, 8 U.S.C. 1101, Note), the new section was to be applicable to all administrative proceedings involving the deportation or exclusion of aliens, notwithstanding (1) that the person involved may have entered the United States prior to the effective date of the new section or of the Immigration and Nationality Act, or (2) that the administrative proceeding may have been commenced or conducted prior to the effective date of the new section or of that Act. It was further provided that any judicial proceeding to review an order of deportation which was pending unheard in any district court on the effective date of the new section (with certain exceptions) was to be transferred for determination to the court of appeals having jurisdiction to review the order under the new section.

[2] The Act of December 29, 1950 (the "Hobbs" Act), as amended, provides that the courts of appeals "shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders" of cer-

and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

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tain designated federal agencies in proceedings under designated statutes (§ 2, as amended, 5 U.S.C. 1032).

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28, United States Code. Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney

General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

(7) nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(8) it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding; or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

2. Parts 3 and 242 of Title 8 of the Code of Federal Regulations provided in pertinent part at the time of the enactment of Section 106 of the Immigration and Nationality Act, *supra*, pp. 22–26 (September 26, 1961) (23 F.R. 9117–9119 and 22 F.R. 9797–9798, respectively):[3]

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[3] Inasmuch as the issue before the Court is essentially one of statutory construction—*i.e.*, whether Congress intended the "final orders of deportation" of which it spoke in Section 106(a) to extend to the denial of a motion to reopen a deportation proceeding—we quote the relevant provisions of the regulations in the form in which they stood when the section was enacted. Intervening changes—see the Cumulative Pocket Supplement to the 1958 Revision of Title 8, C.F.R., for the current provisions—have been mainly formal or phraseological in character. The principal relevant amendment has been the addition to Part 242—effective since January 22, 1962 (26 F.R. 12110, 12113)—of a new section (242.22) providing specifically for reopening of the proceedings before, or reconsideration of the decision by, the special inquiry officer. Similar provisions, relating to proceed-

PART 3—BOARD OF IMMIGRATION APPEALS

§ 3.1 *Board of Immigration Appeals—*

* * * * *

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

* * * * *

(2) Decisions of special inquiry officers in deportation cases, as provided in Part 242 of this chapter.

* * * * *

(d) *Powers of the Board—*

* * * * *

(2) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. * * *

* * * * *

§ 3.2 *Reopening or reconsideration.* The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reconsideration or reopening of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of

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ings before the Board of Immigration Appeals, had long previously been in the regulations (see §§ 3.2 and 3.8 of Part 3, *infra*, pp. 27–30).

a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purpose of this section, any final decision made by the Commissioner prior to the effective date of the act with respect to any case within the classes of cases enumerated in § 3.1(b) (1), (2), (3), (4), or (5) shall be regarded as a decision of the Board.

* * * * *

§ 3.8 *Motion to reopen or motion to reconsider*—(a) *Form.* Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider such order a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under section 242(e) of the act, and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of

execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

(b) *Distribution of motion papers when alien is moving party.* In any case in which a motion to reopen or a motion to reconsider is made by the alien or other party affected, the three copies of the motion papers shall be submitted to the officer of the Service having administrative jurisdiction over the place where the proceedings were conducted. Such officer shall retain one copy, forward one copy to the officer of the Service who made the initial decision in the case, and submit the third copy with the case to the Board.

(c) *Distribution of motion papers when the Commissioner, or any other duly authorized officer of the Service is the moving party.* Whenever a motion to reopen or a motion to reconsider is made by the Commissioner or any other duly authorized officer of the Service, he shall cause one copy of the motion to be served upon the alien or party affected, as provided in Part 292 of this chapter, and shall cause the record in the case and one copy of the motion to be filed directly with the Board, together with proof of service upon the alien or other party affected. Such alien or party shall have a period of ten days from the date of service upon him of the motion within which he may, if he so desires, submit a brief in opposition to the motion. If such a brief is submitted, two copies thereof shall be filed directly with the Board and one copy directly with the Commissioner. The Board, in its discretion, for good cause shown may extend the time within which such brief may be submitted.

(d) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. If the order directs a reopening, the record shall be returned to the officer of the Service having

administrative jurisdiction over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

* * * * *

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

* * * * *

§ 242.8 *Special inquiry officers*—(a) *Authority.* In a proceeding conducted under this part, the special inquiry officer shall have the authority to determine deportability and to make decisions including orders of deportation as provided by section 242(b) of the act, * * * to suspend deportation and authorize voluntary departure as provided by section 244 of the act, * * * and to take any other action consistent with applicable provisions of law and regulations. * * *

* * * * *

§ 242.16 *Hearing*—

* * * * *

(e) *Application for discretionary relief.* The respondent may apply during the hearing for suspension of deportation on Form I–256A, * * * or such other discretionary relief as may be appropriate to the case. * * *

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§ 242.17 *Decision of special inquiry officer*—(a) *Contents.* * * * Except in cases where deportability is determined on the pleadings pursuant to § 242.16 (b) or (d), the decision shall include a summary of the evidence and shall set forth findings of fact and conclusions of law as to deportability. * * * The deci-

sion shall also contain a discussion of the evidence relating to the respondent's eligibility for any discretionary relief requested and the reasons for granting or denying the application. The decision shall be concluded with the order of the special inquiry officer.

* * * * *

§ 242.18 *Order of special inquiry officer.* The order of the special inquiry officer shall be that the alien be deported, or that the proceedings be terminated, or that the alien's deportation be suspended, or that the alien be granted voluntary departure at his own expense in lieu of deportation, * * * or any combination of these orders in the alternative or that such other action be taken in the proceedings as may be required for the appropriate disposition of the case.

* * * * *

§ 242.20 *Finality of order.* The order of the special inquiry officer shall be final except when the case has been certified as provided in § 6.1(c) or § 7.1(b) of this chapter, or an appeal is taken to the Board of Immigration Appeals by the respondent or by the examining officer.

* * * * *